CHIAU MAY INDUSTRIES (M) SDN. BHD.

v.

LIM BOON HOON & 2 ORS.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC.
[ORIGINATING SUMMONS NO. 24-85-92]
23 JUNE 1993

CIVIL PROCEDURE: Interlocutory injunction - Application to restrain breach of provisions in National Land Code on land use - Tenancy Agreement - Main action by plaintiffs to declare tenancy agreement null and void - Whether case an exception to the guidelines established for the granting of injunctions - Whether defendants have locus to ask for interlocutory injunction - s. 127 National Land Code.

The defendants in this application pray for an interlocutory injunction to restrain plaintiffs from carrying out an illegal activity ie. manufacturing brushes, on their piece of land which is subject to the category of "agriculture". The Defendants own a sizeable area of land in the Mukim of Teluk Panglima Garang and entered into a tenancy agreement with the plaintiffs whereby a small portion of the land, on which stood a factory, was let to the plaintiffs. The parties were aware of the category of use ascribed to the land and the said agreement contained clauses prohibiting the doing of any act that would contravene the law.

The plaintiffs failed in the payment of rentals and the defendants commenced distress proceedings. The plaintiffs responded by filing an originating summons (the main action) asking *inter alia*, for a declaration that the tenancy agreement was null and void because it contravened the National Land Code (NLC). They contended that the parties had intended from the start that the factory operate the business of manufacturing brushes. The Defendants denied this saying that what they had intended was the processing of copra, which business was in the nature of agricultural use of the land. (The main action by plaintiffs concerning the validity of the tenancy agreement is awaiting a decision from the High Court). The defendants in applying for an injunction claim that the plaintiffs' flagrant breach of the NLC has put the whole of the said lot in jeopardy; that the land was liable to be forfeited for breach of condition under s127 of the NLC.

The plaintiffs in opposing the injunctory remedy, claim that:

a) the application was contrary to O29 r.1 RHC - the defendants have not filed a suit nor is there any counterclaim

b) that since the plaintiffs have a licence to carry on the activity (manufacturing of brushes), they have a right to operate the business

c) the defendants are seeking equitable relief with "unclean hands"

d) the only person having the power to commence legal action against them is the Land Administrator.

Held:

[1] What is significant in this application, (notwithstanding the dispute on the validity of the tenancy agreement in the main action which still awaits determination) is that there is a clear and undisputed breach of the NLC. The Court would fail in its noble role as guardian of the law if it were to be a mute witness or to turn a blind eye to the illegal activity carried on in the land and to the plight of the defendants.

[2] On plaintiffs' submission:

Ground (a) - The interlocutory relief sought by the defendants is not something distinct from or something unconnected to the plaintiffs' claim ie. the main application. The plaintiffs in their application in the originating summons have already raised the issue regarding the legality of the activity on the demised land (and the validity of the tenancy agreement).

Ground (b) - The procurement of a licence to manufacture brushes under the Sales Tax Act 1972 does not mean the parties are then exempted from complying with the other requirements of the law, namely the NLC and the categories of land use prescribed therein.

Ground (c) - The argument that the defendants had knowledge of the nature of the business operating in the

factory is an issue to be decided in the main application and not in the present interlocutory application. The pertinent fact is that at the time this application was made the second defendant was no longer a director of the company running the business. Thus it cannot be said the defendants have come with unclean hands. On the contrary, it is the plaintiffs who are guilty of this, by their own admission.

Ground (d) - The defendants have the *locus standi* to make this application as they are the registered owners of the land, the subject matter of litigation. They stand to suffer a loss if the land is forfeited. They risk being fined for breach of the condition of the land. It is crystal clear they have a substantial interest and the *locus* to make the application.

[3] The present application is an exception to the principles enunciated in the *American Cyanamid case*. There are several established categories of cases where the *Cyanamid* principles have not been applied or have been applied with modification. The factors below show that the present application falls within these especial categories of cases:

- the applicants for the interlocutory injunction are not the plaintiffs but the defendants

- the common ground is that important fact that an illegal activity is being carried on on the said land which contravenes the NLC and exposes the land to the risk of forfeiture.

In view of the above, questions such as the balance of convenience etc. are not relevant.

[Application granted].

Cases referred to:
*American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504 (**refd**)*
*Hampstead and Suburban Properties Ltd. v. Diomedous [1968] 3 All ER 545 (**refd**)*
*Carter v. Fey [1894] 2 Ch. 541 (CA) (**refd**)*

Legislation referred to:
National Land Code, s. 127
Rules of the High Court 1980, O. 29 r. 1(1)
Sales Tax Act 1972

For the applicant - Ganesan
For the respondent - Saran Singh

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC: This is an application by the defendants by summons in chambers (encl. 13) dated 19 August 1992, for an interlocutory injunction to restrain the plaintiff from carrying out any industrial activity on the defendants' land which is contrary to the National Land Code and the tenancy agreement.

The defendants are the registered proprietors of a piece of land about ten acres in area held under EMR 3938 Lot 1984, Mukim of Teluk Panglima Garang, Selangor Darul Ehsan. On 10 May 1990 they entered a tenancy agreement with the plaintiff company whereby the defendants let to the plaintiff about one acre of the said land together with a factory building erected on the demised land for a period of three years. It is declared in paragraph 3 of the recitals that the parties to the agreement were aware that the said land is subject to the category of "agriculture". In the agreement (at clause 3) the plaintiff agrees, *inter alia*,

> (g) not to keep or permit or suffer to be kept on the demised premises any materials of a dangerous or explosive nature *not to do or permit or suffer to be done on the demised premises anything which will or may infringe any of the laws, by-laws or regulations in force* or which may be a nuisance or annoyance to or in any way interfere with the quiet and comfort of the occupants of neighbouring premises;
>
> (h) *strictly not to use the demised premises for any illegal* or immoral *purposes;* [Italics are mine].

The monthly rental is RM2000. Article 3 of the agreement provides for a contribution of RM100,000 by the plaintiff towards the cost of the building of the factory. The tenancy agreement is silent as to the purpose of the factory.

The contribution was paid by the plaintiffs, but the rentals were not. Accordingly, on 27 January 1992 the defendants commenced distress proceeding against the plaintiff at the Sessions Court Telok Datok (Permohonan Pemula - Distress No. 54-1-1992) and a writ of distress was issued by the Court on 31 Janu-

ary 1992. The plaintiff responded by filing the present originating summons on 13 February 1992, asking, *inter alia*, for a declaration that the tenancy agreement of 10 May 1990 be declared null and void on the ground that it is contrary to the National Land Code, and for an order that the contribution of RM100,000 be refunded. Subsequently, the plaintiff made a further application to the Sessions Court at Telok Datok for a stay of execution of the writ of distress pending the disposal of the present originating summons, which application was granted by the Court on 26 February 1992.

According to the plaintiff's affidavits, from the very beginning the factory is for the purpose of manufacturing brushes and therefore the tenancy agreement as well as the activity intended is contrary to the National Land Code. The defendants' affidavits on the other hand deny that the factory is intended for the manufacturing of brushes and aver that the factory was originally intended for the processing of copra and therefore there is nothing in the agreement that offends the National Land Code. I do not wish to make any ruling on this conflict of evidence on affidavit or as to the validity of the tenancy agreement. I do not think that it is proper for me to do so at this stage of the proceeding. It is my view that such issues should only be decided in the main application which, as a matter of fact, had already been heard before Dato' Mahadev Shanker J. on 2 September 1992 and is now awaiting his Lordship's judgment.

Be that as it may, it is common ground that at the time the defendants filed the present application for interlocutory injunction (19 August 1992) the factory was in fact used by the plaintiff for the purpose of manufacturing brushes and that such an activity is contrary to the National Land Code, and that the defendants' land is liable to forfeiture. Encik Ganeswaran, the learned Counsel for the defendants, argues that by reason of the plaintiff's activity on the demised land which contravenes the National Land Code - and this fact is not only admitted by the plaintiff, but is relied upon by the plaintiff in the main application of the originating summons as the basis for applying to the Court to have the tenancy agreement declared null and void - the interest of the defendants, as the registered co-proprietors, are in jeopardy: since there is a breach of condition of alienation, therefore, under s. 127 of the National Land Code, not only the demised land but the whole of the said land held under EMR 3938 Lot 1984 is liable to be forfeited (and if I may add, the defendants' are also liable to be fined). Therefore, he submits, the defendants are entitled to apply for an interlocutory injunction.

I accept this contention. I am of the opinion that the plaintiff cannot, on the one hand, contend that the activity it is carrying on on the demised land is contrary to the National Land Code yet, on the other hand, insist on carrying on with such activity, especially if the activity is prejudicial to the defendants' interest. In my view, elementary justice requires the plaintiff to cease such illegal activity pending the disposal of the originating summons.

In arriving at such a decision, I am mindful of the principles governing the granting of interlocutory injunctions as enunciated in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504; however, it is generally accepted that the principles enunciated are not meant to be applied rigidly to all cases. There are several established categories of cases where the *American Cyanamid* principles are not applied or are applied with modifications.

I regard the present application as an exception to the principles enunciated in *American Cyanamid* because of the special factors involved in the present case. First, in this application before me, the applicant is not the plaintiff but the defendants. Secondly, both parties have agreed on an important question of fact on which the plaintiff itself is relying upon in the main application: that the plaintiff is carrying on an activity on the demised land which contravenes the National Land Code and which causes the demised land liable to forfeiture. In my opinion, in view of the peculiar circumstances of the case, such questions as to whether there is a serious question to be tried, balance of convenience or adequacy of damages are not relevant. Instead, it is my view that the principle applicable should be the principle as applied in *Hampstead and Suburban Properties Ltd. v. Diomedous* [1968] 3 All ER 545 where there was a plain and uncontested breach of a clear covenant by the defendant, the assignee of the lease, not to play music in the premises leased

to him so as to cause a nuisance to the occupiers of neighbouring premises. In granting the interlocutory injunction to the plaintiff (lessor), Megarry J. said:

> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenanter promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligation falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairn's statement come into its own. Indeed, Lord Cairn's express reference to 'the balance of convenience or inconvenience' suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligation until the trial. It may be that there is no direct authority on this point: certainly none has been cited. If so, it is high time that there was such an authority and now there is.

In the present case, there is a clear and undisputed breach of the National Land Code by the plaintiff. And, *on the assumption* that the tenancy agreement is still valid, it must follow, as a matter of logic, that by virtue of paragraph 3 of the recitals to, and clause 3 (g) and (h) of, the tenancy agreement (provisions which forbid the carrying on of activity which contravenes the National Land Code or any other law), there is also a clear and undisputed breach of the tenancy agreement by the plaintiff by reason of the breach of the National Land Code by the same. Of course I am mindful of the fact that the plaintiff is disputing the validity of the tenancy agreement and that the issue regarding the validity of the tenancy agreement, as I have said earlier, has yet to be determined by Dato' Mahadev Shanker J. However, for the purpose of the present application, since it does not appear to me to be disputed that the tenancy agreement *on the face of it* is valid, and moreover it is also not disputed by the plaintiff that it was a party to the tenancy agreement, I believe that it is incumbent upon me, for the moment, to proceed on the hypothesis that the tenancy agreement is valid. But let it be reiterated here that what is emphasised by the defendants and appears more significant to me, in granting this application, is the clear and undisputed breach of the National Land Code rather than the breach of the tenancy agreement. Indeed, for the purpose of asking this Court to restrain the plaintiff from carrying on its illegal activity on their land, it would have been sufficient for the applicants to ask in their prayer for relief only in respect of the breach of the National Land Code; there is no necessity to include in the prayer any reference to the of breach of the tenancy agreement. They would have achieved their purpose even if they had merely asked this Court to restrain the plaintiff from carrying out any activity on their land which is contrary to the National Land Code.

Having stated and applied the principle in *Hampstead and Suburban Properties*, I wish to add that, to my mind, in the present case there is no doubt that there would be injustice caused to the defendants if the Court were to remain as a helpless bystander and allow the defendants to suffer the likelihood of their land being forfeited or to suffer the likelihood of being fined by the Land Administrator. There is a blatant disregard of the law by the plaintiff; and the plaintiff is profiting from its own wrong doing. The Court would fail in its noble role as the guardian of the law if it were to be a mute witness or to turn a blind eye to such illegality and to the plight of the defendants.

It is also pertinent for me to point out that the plaintiff has nothing to lose by the granting of an interlocutory injunction, even if ultimately, in the main application, judgment is given in its favour. It is true that granting the interlocutory injunction would result in the closing down of the plaintiff's business of manufacturing brushes and consequential loss to the plaintiff. But the plaintiff has no reason to complain because the plaintiff itself has admitted that, in the first place, it is contrary to the National Land Code for it to carry on such activity on the land.

In opposing this application, Encik Saran Singh, learned Counsel for the plaintiff makes the following submissions:

(a) that this application is contrary to O. 29 r. 1(1) of the Rules of the High Court in

that the defendants have not filed any suit, nor is there any counterclaim by the defendants;

(b) that the plaintiff has the right to operate the factory to manufacture brushes on the defendants' land because the plaintiff has a licence to carry on such an activity.

(c) that the defendants in seeking the relief have not come to the Court with "clean hands"; and

(d) that the defendants have no *locus standi* and that only the Land Administrator has the power to take legal action against the plaintiff.

As to (a), it is true that the defendants have not filed any claim or counterclaim against the plaintiff. But with respect to learned Counsel, I do not think they need do so. In my opinion, the relief sought by the defendants is incidental to or arises out of the plaintiff's action. The interlocutory relief sought by the defendants is not something distinct from or something unconnected to the plaintiff's claim in the main application. The plaintiff in its main application in the originating summons has raised the issue regarding the legality of its activity on the demised land (and also as to the validity of the tenancy agreement). In *Carter v. Fey* [1894] 2 Ch. 541 (C.A.), the plaintiff, who had been in partnership with the defendant, gave notice of motion for an interlocutory injunction to restrain the defendant from carrying on directly or indirectly the business of a wine, ale and spirit merchant in the City of Winchester or within a radius of two miles. The defendant appeared to the writ, and no statement of claim having been filed and no defence or counterclaim having been put in, he gave cross notice of motion for an interlocutory injunction restraining the plaintiff from using the name of the defendant on vans, signboards, or labels or otherwise, in carrying on his business. Lindley LJ defined the legal issue in that case as follows:

> The question is whether a defendant who is in a hurry is entitled to apply by way of motion in the plaintiff's action for an injunction without waiting to deliver a counterclaim or issuing a writ in a cross-action, where the relief which he seeks is not in any way comprised in or incidental to the plaintiff's cause of action.

Carter v. Fey is authority for the principle that a defendant who has not filed a counterclaim may apply for an injunction against the plaintiff if the relief sought by the injunction is incidental to or arises out of the relief sought by the plaintiff. At p. 544 Lindley LJ said:

> If the defendant's application for an injunction were in any way connected with or incidental to the object and purpose of the plaintiff's action, he would have good ground for his contention: but it has really nothing to do with the relief sought by the Plaintiff, and therefore, in my opinion, the Defendant is wrong.

As to (b), the plaintiff contends that it has a licence to manufacture the brushes under the Sales Tax Act 1972 and as such the defendants cannot legally stop it from carrying on such activity. I do not think there is any merit in the argument. Just because the plaintiff has complied with the requirement of the Sales Tax Act 1972, it does not mean that the plaintiff or the defendants are exempted from complying with the other requirements of the law, including complying with the condition attached to the land as imposed by the National Land Code.

Learned Counsel next contends (contention (c)) that the defendants cannot seek the equitable relief sought from this Court because they have not come to this Court with "clean hands". Learned Counsel points out that the second defendant was one of the directors of the plaintiff company (see encl. 15) and therefore had knowingly participated in the illegal activity (manufacturing brushes) on the said land. The second defendant, however, in his affidavit in reply in encl. 17 states that he was appointed director on 21 May 1991, that it was only a temporary appointment and that the appointment was terminated on 1 October 1991. He adds that, during the period when he was a director, the business of the company was managed by another director by the name of Lai Chin Hui. He claims that the said Lai Chin Hui never consulted him and that he had no knowledge regarding the running of the business of the company. He maintains that the defendants had originally let out the land for an agricultural purpose, that is, for the processing of copra and for the construction of a building for such purpose.

Now, whether or not the second defendant - or all three defendants - has knowledge that the factory was used for manufacturing brushes is not for me to decide in this interlocutory application. It is a matter to be decided in the main application. But the pertinent fact is that - and this is not disputed by the plaintiff - at the time the application for interlocutory injunction was filed (19 August 1992) the second defendant was no longer a director of the company. This being so, I fail to see how it can be argued that the second defendant (much less the first and third defendants) has not come to Court with clean hands. On the contrary, by admitting to have contravened the National Land Code, it is the plaintiff itself who has not come to Court with clean hands.

As to contention (d), I fail to see how, by reason of the fact that the National Land Code confers on the Land Administrator with the necessary powers to proceed with the enforcement of the forfeiture of the defendants' land by reason of the breach of the condition of alienation, it can be seriously contended that the defendants have no *locus standi* to make this application for an interlocutory injunction. The defendants are the registered owners of the land. They are the ones who will suffer a loss if the land were to be forfeited. They are the ones who are liable to be fined for the breach of condition. They have a cause of action against the plaintiff. They could have asked this Court, if they had so desired, for an injunction against the plaintiff (in an cross-action) to restrain the plaintiff from carrying on with the activity of manufacturing brushes on their land. It is, therefore, crystal clear that they have a substantial interest and the *locus standi* to make this application.

Accordingly, this application is granted.

MAJUJAYA HOLDINGS SDN. BHD.

v.

PENS-TRANSTEEL SDN. BHD. & ANOR.

HIGH COURT, PULAU PINANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J
[CIVIL SUIT NO. 22-73-93]
19 MAY 1993

COMPANY LAW: Interim order - Application for appointment of liquidator - Whether the appointment of a nominee company was properly made - Whether plaintiff has locus standi in suit - Whether a nominee may sue in its own name.

The Plaintiff (P) applied for liquidators to be appointed for the First Defendant (D1). P claimed to be the nominee of one Transteel PTY Ltd., a company incorporated in Australia and a party to a joint venture agreement (the Agreement) with D2 Pens Holdings S/B. D1 was formed pursuant to the Agreement.

Counsel for the Defendants argued that P had no locus standi in the matter. P contended that it brought the action on the basis that it is the nominee of the said Transteel PTY. Ltd. The Agreement was" between Transteel PTY Ltd. *or its nominee ..*". The director of Transteel PTY Ltd used the letterhead of one Transteel *Australia* PTY Ltd when writing to D2 saying it was appointing P as its nominee. In June 1991 Transteel PTY Ltd went into liquidation in Australia.

Held:

[1] P relied heavily on the minutes of the Board of Directors Meeting of D1 to give itself locus standi. However, those are the minutes of D1, the company formed by the parties to the Agreement under the Agreement. They are not the minutes of D2, the actual party *to* the Agreement. It is thus incorrect to say that D2 had accepted the appointment of P as a nominee of Transteel PTY Ltd. There was also no letter of authority enabling P's solitors to act on behalf of the liquidator of Transteel PTY Ltd.

P has not proved on the balance of probabilities that D2, the contracting party to the Agreement had accepted P as the nominee of Transteel PTY Ltd, the other contracting party. D2 must accept P as the nominee before P, if at all, can be a party to the contract and sue on it.